No.

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1997

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION,

Petitioner,

vs.

VIRGINIA M. MARQUES,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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Lutz Appellate Services, inc.

52 pp

ISSUE PRESENTED FOR REVIEW

Section 24, Fifth of the National Bank Act, 12 U.S.C. § 24, gives the directors of national banks authority to dismiss bank officers "at [their] pleasure." For over a century, that statute — and analogous provisions of other federal banking statutes — have been held to preempt contrary state statutory and common law claims. Does the passage of Title VII of the Civil Rights Act of 1984, 42 U.S.C. §§ 2000e-2000e-17 and other recent civil rights statutes impliedly overrule that case law and allow a terminated bank officer to assert state law public policy tort and statutory discrimination claims?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Bank of America National Trust and Savings Association ("the Bank") is a wholly owned subsidiary of BankAmerica Corporation. The following are corporate subsidiaries or affiliates of the Petitioner that are or may be publicly held: BA Merchant Services, Inc.; Bank America Capital I; BankAmerica Capital II; BankAmerica Capital III; BankAmerica Capital IV; BankAmerica Institutional Capital A; BankAmerica Institutional Capital B; KorAm Bank; BA Lepanto (Philippines); Hong Kong and Shanghai Insurance Co. Ltd.; AArnBank Singapore; BA Savings Bank (Philippines); Inchroy Credit Corporation Ltd.; Foppingadreef Investments; and Debt Recovery Ltd. BankAmerica Corporation has announced its intention to merge with NationsBank Corporation which, subject to shareholder and regulatory approval, is expected to occur in the fourth quarter of 1998.

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Petitioner Bank of America National Trust and Savings Association ("the Bank") seeks a writ of certiorari to review the final decision of the California Court of Appeal, partially reversing summary judgment in Petitioner's favor. Appendix ("App.") at 1a-11a. The California Supreme Court has denied review. App. at 16a.

The Court of Appeal concluded that Section 24, Fifth of the National Bank Act ("NBA"), 12 U.S.C. § 24, Fifth ("Section 24, Fifth"), which grants national banks authority to dismiss bank officers "at pleasure," was partially repealed by implication by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 and related federal civil rights statutes. As a result, the court held that the NBA no longer preempts Respondent Virginia Marques' state law claims that her dismissal as an officer of the Bank: (1) constituted a common law tort in violation of California public policy; (2) violated the anti-discrimination provisions of California's Fair Employment and Housing Act (Cal. Govt. Code §§ 12900-12996) ("FEHA"); and (3) violated California's Equal Pay Act (Cal. Labor Code § 1197.5). App. at 1a-11a.

OPINIONS BELOW

The opinion of the California Court of Appeal, First Appellate District, Division Two, is reported as *Marques v. Bank of America, NT & SA*, 59 Cal. App. 4th 356 (1998), and reproduced in Appendix A at pp. 1a-11a. The order of the Superior Court in and for the City and County of San Francisco appears in Appendix B at pp. 12a-15a. The order of the California Supreme Court denying review appears in Appendix C at p. 16a.

STATEMENT OF JURISDICTION

The California Supreme Court denied review on March 11, 1998. App. C at 16a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The following relevant statutes are reproduced in Appendix D: (a) National Bank Act, 12 U.S.C. § 24 (1998); Federal Reserve Bank Act, 12 U.S.C. § 341 (1998); Federal Home Loan Bank Act, 12 U.S.C. § 1432 (1998); Federal Age Discrimination in Employment Act, 29 U.S.C. § 623 (1998); Federal Equal Pay Act, 29 U.S.C. § 206 (1998); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1998); California Fair Employment and Housing Act, Cal. Gov't Code § 12900 (1997); California Equal Pay Act, Cal. Labor Code § 1197.5 (1997).

STATEMENT OF THE CASE

Respondent Virginia Marques was employed by petitioner until 1994, when her position was eliminated. Because Marques was a bank officer, she was terminated under the authority of Section 24, Fifth of the NBA, which grants national banks the authority to dismiss bank officers at their discretion. Marques then filed a complaint in California state court alleging several state law causes of action: (a) in tort for wrongful termination in violation of public policy; (b) for unlawful discrimination based on age, sex and national origin in violation of FEHA; (c) for violation of the California Equal Pay Act; (d) for breach of contract; and (e) for breach of the implied covenant of good faith and fair dealing.[1] *See* App. at 2a.

Petitioner successfully moved for summary judgment on the ground that each of Marques' state law claims was preempted by Section 24, Fifth. App. 12a-15a.

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[1] In a separate action, pending in the Northern District of California, Marques alleges that her dismissal also violated Title VII of the Civil Rights Act of 1964 (as amended), 42 U.S.C. §§ 2000e-2000e-17, the federal Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and the federal Equal Pay Act, 29 U.S.C. § 206. *Virginia M. Marques v. Bank of America, National Trust and Savings Association*, No. C-96-1932 (TEH) (N.D. Cal.).

The California Court of Appeal reversed the summary judgment as to all claims except the contract claims. It reasoned that prior case law holding that Section 24, Fifth preempts state common law and statutory employment discrimination claims was implicitly vitiated by the enactment of Title VII (and other similar federal civil rights statutes). In the court's view, passage of these later statutes partially repealed Section 24, Fifth by implication, thereby allowing terminated bank officers to assert *federal* discrimination claims. That being the case, the court found that the rationale for continuing to give preemptive effect to Section 24, Fifth over state law public policy tort and statutory discrimination claims was also vitiated. The court concluded that by allowing federal discrimination claims, Congress effectively eliminated any conflict in the "objectives" of federal and state policy and further diminished any federal interest in applying a uniform standard to national banks with respect to retention of their officers. App. at 8a-10a.

The California Supreme Court denied review. App. 16a.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO ADDRESS THE RELATIONSHIP BETWEEN THE PRINCIPLES OF REPEAL BY IMPLICATION AND IMPLIED PREEMPTION AND TO RESOLVE THE RECURRING CONFLICT OVER WHETHER BANK OFFICERS MAY ASSERT STATE LAW DISCRIMINATION CLAIMS.

For well over a century, federal law has provided that officers of national banking associations serve at the "pleasure" of their respective employers' boards of directors. *See* 12 U.S.C. § 24, Fifth.[2] Other federally-regulated financial institutions have long

[2] Section 24, Fifth states that national banks shall have the power:

> To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their

(continued)

had similar authority. *See* 12 U.S.C. § 341 (enacted in 1913) (federal reserve banks); 12 U.S.C. § 1432(a) (enacted in 1932) (federally chartered thrift institutions).

For substantially that same period, federal and state courts have unanimously held that this standard is intended to operate uniformly throughout the nation, and under the Supremacy Clause, preempts state employment law.[3]

(continued)

> duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places.

12 U.S.C. § 24, Fifth (emphasis added).

[3] *See, e.g., Westervelt v. Mohrenstecher*, 76 F. 118, 122-23 (8th Cir. 1896) (Section 24, Fifth precludes employment contracts between bank and its officers that are contrary to its dismissal "at pleasure" provision); *Rankin v. Tygard*, 198 F. 795, 798-99 (8th Cir. 1912) (Section 24, Fifth requires implied condition in any contract between national bank and its officers that they may be dismissed "at pleasure" of bank's board of directors); *Wells Fargo Bank v. Superior Court*, 53 Cal. 3d 1082, 1087-88 (1991) ("It has been established for almost a century that [S]ection 24 [, Fifth] preempts all state law causes of action by a bank officer for breach of an employment agreement. . . . We are aware of no decision to the contrary. . . ."). *See also Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 525-26 (9th Cir. 1989) (citing cases; contract and tort claims preempted); *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1098 (9th Cir. 1981) (analogous provision of Federal Reserve Act preempts state law tort and contract claims); *Siddoway v. Bank of America*, 748 F. Supp. 1456, 1461 (N.D. Cal. 1990) (same); *Holland v. Bank of America*, 673 F. Supp. 1511, 1516-17 (S.D. Cal. 1987) (same); *Obradovich v. Federal Reserve Bank of New York*, 569 F. Supp. 785, 790 (S.D.N.Y. 1983) (analogous provision of Federal Reserve Act preempts implied contract claims); *Ambro v. American Nat'l Bank & Trust Co.*, 394 N.W. 2d 46, 48-49 (Mich. Ct. App. 1996) (claims for wrongful discharge, negligence and breach of good faith preempted); *Mardula v. Rancho Dominguez Bank*, 43 Cal. App. 4th 790, 793-94 (1996), *cert. denied*, 117 S. Ct. 1106 (1997) (breach of contract, oral contract, implied contract, covenant of good faith and fair dealing, public policy tort and statutory discrimination claims preempted);

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Were there nothing more, application of these principles would dispose of respondent's state law claims in this case. However, beginning in the mid-1960's, Congress for the first time enacted statutes directed to the employment practices of private, non-federal employers. *See, e.g.*, 42 U.S.C. §§ 2000e-2000e-17 (Title VII); 29 U.S.C. §§ 621-634 (Age Discrimination In Employment Act); 29 U.S.C. § 206(d)(1) (Equal Pay Act). In enacting these statutes, Congress did not say anything about their intended interplay with Section 24, Fifth of the NBA or with other federal banking statutes which contain analogous provisions.

In the face of this uncertain legislative record, several courts have held that the *federal* banking and civil rights statutes — laws of equal dignity — must be reconciled by reading Section 24, Fifth to accommodate the requirements of the more recent federal civil rights laws.[4] That is, the "at pleasure" language in Section 24, Fifth is deemed to have been impliedly repealed by subsequent federal civil rights statutes. As a consequence, dismissed bank

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Confer v. Federal Home Loan Bank, 649 N.E. 2d 476, 478 (Ill. App. Ct. 1995) (state law claim for retaliatory discharge preempted); *City Nat'l Bank v. Brown*, 599 So. 2d 787 (La. Ct. App. 1992) (state law wrongful termination claim preempted); *Aalgaard v. Merchants Nat'l Bank*, 224 Cal. App. 3d 674, 689-90 (1990) (contract, tort and public policy tort claims preempted); *McGeehan v. Bank of New Hampshire, Nat'l Ass'n*, 455 A.2d 1054, 1055-56 (N.H. 1983) (state law claims preempted); *Kemper v. First Nat'l Bank in Newton*, 418 N.E. 2d 819, 820-21 (Ill. App. Ct. 1981) (breach of contract and wrongful termination claims preempted); *Kozlowsky v. Westminster Nat. Bank*, 6 Cal. App. 3d 593, 596-97 (1970) (breach of contract claims preempted).

[4] *See, e.g., Mueller v. First Nat'l Bank of The Quad Cities*, 797 F. Supp. 656, 663 (C.D. Ill. 1992) (dismissed bank officers may assert federal ADEA and ERISA claims); *Mardula*, 43 Cal. App. 4th at 793 ("[T]he cases demonstrate that [S]ection 24 [Fifth], and similar provisions covering employees of Federal Reserve Banks (12 U.S.C. § 341) and federally chartered thrift institutions (12 U.S.C. § 1432(a)) . . . do not . . . appear to bar claims that the discharge violated federal anti-discrimination statutes.") (citations omitted).

officers may assert *federal* discrimination claims, since the two sets of laws on their face are not otherwise capable of coexisting and Congress did not specify how the pre-existing statute (Section 24, Fifth of the NBA) was to be interpreted in light of later federal anti-discrimination laws.

Those holdings give rise to the issue presented by this case: Whether the implied partial repeal of Section 24, Fifth by subsequent federal civil rights statutes *also* affects the relevant *preemption* analysis? In other words, in enacting Title VII (and similar federal civil rights statutes), did Congress — without saying so — not only intend to modify *substantive* federal employment law applicable to officers of national banking associations, but *also* to eradicate decades of case law holding that Section 24, Fifth preempts state law claims by dismissed bank officers?

Resolution of this question presents an important, and unresolved, conflict between two well-recognized principles of statutory interpretation: repeal by implication and implied preemption. This Court has observed repeatedly that "it is a cardinal rule . . . that repeals by implication are not favored." *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 262 (1992). Such repeals will be inferred only where two federal statutes are otherwise irreconcilable and, then, only to the narrowest extent necessary to harmonize competing statutory schemes.[5]

The reasons for this judicial reluctance are surely evident. By definition, the exercise involves the construction of legislative intent where there is no evidence that the issue was, in fact,

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[5] *See Posadas v. National City Bank*, 296 U.S. 497, 503 (1935) ("where provisions in the two acts are in irreconcilable conflict, the latter act to the extent of the conflict constitutes an implied repeal of the earlier one"); *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) ("'Repeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary. . . .'") (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) (brackets in original).

considered or even recognized by Congress. It is, thus, an exercise in judicial necessity, but one which becomes an illicit encroachment upon the legislative prerogative if extended beyond narrow bounds.

The Court of Appeal in this case followed a different course. In its view, the controlling canon of construction is not the presumption against implied repeal, but the presumption against implied preemption. "[P]re-emption," said the court, "is not to be lightly presumed." App. at 4a (quoting *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987)).

Having thus declared itself free of the constraints of statutory language, decades of case law holding that Section 24, Fifth preempts state employment law,[6] or the need to avoid usurping the legislative function, the Court of Appeal undertook to assess, for itself, the purported objectives of state and federal employment law, considered in their "fullest sense." App. at 10a. According to the court, the enactment of Title VII "effectively vitiated any . . . conflict" between state and federal law on "the subjects" of employment discrimination. Hence, "there is simply no conflict between federal law (*considered in its fullest sense*) and California's [laws on the same subject]." App. at 9a-10a (emphasis added).[7]

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[6] *See Thompson v. Thompson*, 484 U.S. 174, 180-81 (1988) (statutory construction includes consideration of existing case law at the time Congress enacted the statute at issue, as part of the backdrop against which Congress acts).

[7] The Court of Appeal effectively treated passage of Title VII as if it were an amendment *of the NBA itself* rather than an entirely separate statute. Had Congress, in fact, amended Section 24, Fifth of the NBA to add language comparable to Title VII, the relevant preemption analysis might well be different. While the issue still would be whether Congress thereby intended to preempt state law, notwithstanding a failure to so provide, that question would be answered by considering the hypothetically amended NBA (including its inclusion of the new non-discrimination language) by reference

(continued)

Petitioner submits that the Court of Appeal's approach was fundamentally misguided. And, most important for present purposes, its error matters.

A.

Had the Court of Appeal been more respectful of the legislative function and the appropriate limits of judicial review, it would have reached a different result. Prior to enactment of Title VII, officers of a national bank served at the pleasure of the bank's board of directors. However, after 1964, that unfettered discretion could not be squared entirely with the provisions of Title VII which place certain grounds for termination out of bounds *as a matter of federal law*. Even though Title VII says nothing directly about the validity *vel non* of Section 24, Fifth of the NBA, the two statutes, literally read, cannot fully coexist.

Thus, to the limited extent necessary to harmonize the two federal acts, the application of recognized canons of statutory construction implies a congressional intention to modify or repeal in part the prior statute. However, nothing in that analysis requires (or suggests the propriety of) going beyond the narrow limits necessary to harmonize Title VII (and other federal civil rights statutes) and Section 24, Fifth (and analogous federal banking laws) by also allowing a terminated bank officer to claim that his or her dismissal also violates *state* anti-discrimination law.

Another way of making the same point is that Section 24 Fifth, in effect, embodies two *separate* federal legislative judgments:

(continued)
to the *changed* statutory objectives of the NBA. By contrast, where, as here, Congress enacts a subsequent independent statute which conflicts with earlier legislation but does not amend it, a court may do no more than imply a Congressional intent to repeal or modify the earlier federal act to the limited extent necessary to harmonize the two statutes. *See* text, *supra*.

first, Congress' judgment as to the appropriate substantive standard for the retention and dismissal of bank officers, and, *second*, Congress' intention that this substantive standard — whatever its content — be applied uniformly, to the exclusion of state law. Passage of Title VII and other federal civil rights laws altered the *substantive* standard for the retention of bank officers by restricting the grounds on which they might be dismissed to the extent provided by those federal civil rights laws.

However, that modification does not speak at all to the separate issue of uniformity. That latter requirement — which has been consistently held to cause Section 24, Fifth to preempt state law — remains every bit as much an affirmative command of the federal banking statutes *after* enactment of Title VII (and related civil rights laws) as it was before. *See* pp. 10-12, *infra*.[8]

The problem with the Court of Appeal's focus on the broader "subject" or "objectives" of California and federal law is that nothing in the passage of Title VII or other civil rights laws provides it with warrant to address that issue in the first instance. The court's approach was, to the contrary, a pure exercise in judicial usurpation of the legislative function. It may be that there is no longer a need to preserve a separate or uniform rule for the retention of national bank officers.[9] However, as the Court of Appeal below

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[8] The Court of Appeal's only discussion of the uniformity issue was to observe that with the passage of the federal civil rights laws any federal interest in uniformity had been "diminished." App. at 8a. But this reasoning erroneously assumes that the federal civil rights laws carry with them state public policy tort and statutory anti-discrimination law. That premise is mistaken. As we explain in text, the fact that recent federal statutes such as Title VII must be harmonized with the NBA does not speak at all to the separate question of whether the standard for retention of national bank officers ought to remain uniform and therefore preemptive of state law.

[9] Though we dispute it. *See* pp. 10-12, *infra*.

paradoxically recognized (App. at 8a n.5), that is a judgment to be made by Congress, not the courts, let alone by fifty separate state judicial systems.

Put otherwise, Congress did not write on a clean slate — preemption-wise — when it enacted Title VII and other federal civil rights statutes. While passage of those statutes may necessitate resort to the implied repeal doctrine to the limited extent necessary to harmonize competing federal statutes (the federal banking and civil rights laws), it does not call for (or allow) reassessment of the long-standing rule that Congress intended a uniform national approach to the retention and dismissal of bank officers that promotes the safety and soundness of financial institutions, or justify a judicial redefinition of the interplay between federal and state employment law for federally-regulated banks generally.

B.

The decision to grant national banks broad discretion over employment issues reflects a clear and purposeful policy choice by Congress. Far from being an isolated or unique statutory provision, Congress has included parallel language in other federal banking statutes. *See* 12 U.S.C. § 341 (federal reserve banks); 12 U.S.C. § 1432(a) (federally chartered thrift institutions). Moreover, notwithstanding many other amendments to the NBA and other federal banking laws over the past thirty years — subsequent to the enactment of Title VII and related civil rights laws — Congress has left Section 24, Fifth and the analogous provisions of other federal banking laws unchanged.[10]

The inclusion of parallel language in these other federal banking statutes, as well Congress' failure to modify Section 24,

[10] *See, e.g.*, 12 U.S.C.A. § 24 (May 1997 Supp.) at 513 (summary history of amendments to NBA); 12 U.S.C.A. § 226 (1989) at 39-41 (summary history of amendments to Federal Reserve Act); 12 U.S.C.A. §§ 1421-1447 (1989) at 522-622 (summary history of amendments to each section of the Federal Home Loan Bank Act).

Fifth in connection with any of its post-1964 revisions to the NBA, underscores the purposeful nature of the relevant statutory language. This Congressional decision reflects, as well, the special role played by federally-chartered banks and the need to preserve public confidence in the banking system.[11]

It also would be inappropriate to conclude, as a policy matter, that because national banks are subject to Title VII and other federal civil rights laws, there no longer is any reason to maintain the NBA's preemption of *state* anti-discrimination law. These are quite separate issues.

It does not follow that because Congress implicitly agreed to limit the discretion of national banks over their officers to the extent provided by Title VII (and related federal civil rights laws), Congress also thereby intended to impose on them the quite different, and varied, provisions of fifty states' employment laws. It is one thing to subject national banks to a uniform federal obligation to refrain from discriminating on the basis of, *e.g.*, race or gender, and quite another to subject them to the vagaries of state and local statutes and common law that impose a variety of requirements on the evaluation of employment decisions differing from, and in some cases going far beyond, those mandated by federal law.[12]

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[11] *See Mackey*, 867 F.2d at 526 (policies underlying Section 24, Fifth include "giv[ing federal financial] . . . institutions the greatest latitude possible to hire and fire their . . . officers, in order to maintain the public trust."); *Mardula*, 43 Cal. App. 4th at 793-94 (Section 24, Fifth "implement[s] a forceful policy that a nationally chartered bank must be free to remove and replace its officers at will. . . . '[I]t is essential to the safety and prosperity of banking institutions that the active officers, to whom integrity and discretion the moneys and property of the bank and its customers are entrusted, should be subject to immediate removal whenever even the suspicion of faithlessness or negligence attaches to them.' . . . The policy is one of long standing; the 'at pleasure' language has been in the statute for 131 years.").

[12] California law is illustrative: (a) Title VII places strict limits on the nature and (continued)

As noted above, whatever the debate about the necessity of continuing to provide national banks with greater discretion over employment decisions than is afforded to other employers, that is a judgment for Congress, not the judiciary, to make. Moreover, it is a judgment that Congress has made. Absent clear Congressional intention to reexamine that judgment, there is no basis for a California Court of Appeal, or any other court for that matter, to do so.

(continued)
amount of compensatory damages. 42 U.S.C. § 1981a(b)(3). California law, however, sets no such limits. Cal. Gov't Code § 12970. (b) Title VII's cap on available damages includes a strict limit on punitive damages. 42 U.S.C. § 1981a(b)(3). California law contains no limits on punitive (or other) damages. Cal. Gov't Code § 12970. (c) Title VII generally imposes a "knew or should have known" standard for imposing employer liability. California law imposes strict liability on an employer for the conduct of its supervisors who are managing agents. *See Kelly-Zurian v. Wohl Shoe Co.*, 22 Cal. App. 4th 397, 405 (1994). (d) Title VII does not provide for individual liability. 42 U.S.C. § 2000e(b); California law allows individual liability. Cal. Gov't Code §§ 12926(d), 12940(h)(1), 12941(a). State public policy tort claims and federal anti-discrimination law are similarly in conflict. There is no federal analogue to such tort claims. Moreover, whether a state's common law recognizes public policy tort claims — and, if so, the contours of such claims and the type of relief available — are matters left to that state's courts. Thus, public policy tort claims vary widely from state to state, and are subject to change by evolving court decisions. *Compare, e.g., Schriner v. Meginnis Ford Co.*, 421 N.W. 2d 755 (Neb. 1988) (public policy tort claim requires that challenged dismissal violates a specific statutory or constitutional provision); *Johnson v. McDonnel Douglas Corp.*, 745 S.W. 2d 661 (Mo. 1988) (same); *Schultz v. Production Stamping Corp.*, 434 N.W. 2d 780 (Wis. 1989) (same); *McClung v. Marion County Comm'n*, 360 S.E. 2d 221 (W. Va. 1987) (same); *Smith v. Electronic Sys. Div. Of Bristol Corp.*, 557 N.E. 2d 711 (Ind. Ct. App. 1990) (same) *with, e.g., Berube v. Fashion Center Ltd.*, 771 P.2d 1033 (Utah 1989) (no such requirement); *Glaz v. Ralston Purina Co.*, 509 N.E. 2d 297 (Mass. App. Ct. 1987); *Cilley v. New Hampshire Ball Bearings, Inc.*, 614 A.2d 818 (N.H. 1986) (same); *Sugarcane v. RCA Corp.*, 639 F. Supp. 780 (M.D. Pa. 1985) (same).

C.

The fact that Title VII expressly preserves state anti-discrimination statutes does not compel a different conclusion.[13] In fact, this Court previously addressed a closely analogous issue in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), which dealt with the preemptive effect of ERISA on pre-existing state statutes in light of Title VII.

In *Shaw*, plaintiffs argued that because Title VII preserves state anti-discrimination statutes and ERISA does not preempt Title VII, ERISA does not preempt state law. The Second Circuit rejected this "simplistic" argument, and this Court approved its reasoning, noting that "Title VII does not transform state fair employment laws into federal laws that [ERISA] . . . saves from ERISA preemption." 463 U.S. at 101 n.22.

Moreover, *Shaw* specifically held that in enacting Title VII, Congress did not — contrary to the Court of Appeal's reasoning in this case — affirmatively adopt as a *federal* policy the promotion of state anti-discrimination laws that provide *greater* protection than federal law:

> Appellants argue that pre-emption of the [New York] prohibition of pregnancy discrimination would impair Title VII because that law encourages [s]tates to enact

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[13] Title VII's "savings clause" provides that:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

42 U.S.C. § 2000e-7.

> fair employment laws providing greater substantive protections than Title VII. . . . *We have found no statutory language or legislative history suggesting that the federal interest in state fair employment laws extends any farther than saving such laws from pre-emption by Title VII.*

Shaw, 463 U.S. at 103 n.24 (emphasis added).[14]

D.

The issue presented here is an important and unresolved one which this Court ought to address. However clear we may believe the appropriate analysis is — a view shared by the majority of courts which have considered the issue[15] — both the court below

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[14] In *Shaw*, this Court did hold that certain aspects of state discrimination law were not preempted by ERISA because such preemption would impair the operation of Title VII. That issue was relevant only because Congress explicitly limited ERISA's broad preemptive impact so as not to "alter, amend, modify, invalidate, impair, or supersede any law of the United States." 29 U.S.C. § 1144(d). Here, by contrast, there is no similar statutory limit on NBA preemption. Thus, the only basis for concluding that the NBA does *not* preempt state anti-discrimination laws is the Title VII savings clause argument, which both the Second Circuit and this Court have rejected. *See* 463 U.S. at 101 n.22.

[15] *See Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987) (analogous Federal Reserve Act dismissal provision preempts state law discrimination claims); *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983) (state law public policy tort claim preempted); *Kispert v. Federal Home Loan Bank of Cincinnati*, 778 F. Supp. 950, 952-53 (S.D. Ohio 1991) (analogous provision of Home Loan Bank Act preempts state law age discrimination, fraud and misrepresentation claims); *Osei-Bonsu v. Federal Home Loan Bank of New York*, 726 F. Supp. 95, 98 (S.D.N.Y. 1989) (analogous provision of Federal Home Loan Bank Act preempts state law discrimination claims); *Mardula*, 43 Cal. App. 4th at 793-94 (1996) (state law public policy tort and discrimination claims pre-empted); *Aalgaard*, 224 Cal. App. 3d 674 (1990) (state law discrimination claims preempted).

and one federal district court have reached a contrary conclusion.[16] There is, thus, a plain conflict on the issue that only this Court is capable of resolving.

As matters now stand, the issue is likely to arise in each of the fifty states. Federally regulated banks operate in every state, most states have statutory anti-discrimination laws, many recognize common law "public policy" torts, and employment termination disputes are a common subject of litigation. Moreover, with the several recently-announced mergers in the banking industry and the continued expansion of federally-regulated banks, the importance of preserving uniformity in an area where that has been declared Congresional policy for over 100 years takes on even greater significance.

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[16] *See Moodie v. Federal Reserve Bank of New York*, 831 F. Supp. 333 (S.D.N.Y. 1993).

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT, DIVISION TWO FILED NOVEMBER 19, 1997

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION TWO

A073882, A074529

San Francisco County
Super. Ct. No. 966157

VIRGINIA M. MARQUES,

Plaintiff and Appellant,

v.

BANK OF AMERICA, NT & SA,

Defendant and Respondent.

I. INTRODUCTION

Virginia M. Marques appeals from a summary judgment in favor of her former employer, Bank of America. She contends the trial court erred in finding that all her claims were preempted by the National Bank Act.

II. FACTUAL AND PROCEDURAL BACKGROUND

On December 29, 1994, Marques filed a wrongful discharge complaint alleging that she was a 57-year-old Hispanic woman who had worked for Bank of America for 38 years, was promoted to Vice President in 1992, and terminated in 1994. She alleged causes of action for unlawful discrimination based on age, sex, and national origin under California's Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), as well as for violation of the state's Equal Pay Act (Lab. Code, § 1197.5), wrongful termination in violation of public policy (FEHA; Unemp. Ins. Code, § 2070 et seq.), breach of contract, and breach of the covenant of good faith and fair dealing. In its answer, the Bank asserted as an affirmative defense that all Marques's claims were preempted by section 24 (Fifth) of the National Bank Act (12 U.S.C. § 21 et seq.). On January 8, 1996, the Bank filed a motion for summary judgment on preemption grounds. After a hearing, the court granted the motion and entered judgment accordingly.

Thereafter, the Bank filed a memorandum of costs. After filing a timely notice of appeal from the judgment, Marques filed a motion to strike or tax costs, and a motion for sanctions (Code Civ. Proc., § 128.5). After a hearing, the trial court denied both motions. Marques's appeal from the postjudgment order has been consolidated with her appeal from the judgment.

III. DISCUSSION

"A defendant may show entitlement to summary judgment either by showing one or more elements of each cause of action cannot be established, or by establishing an affirmative defense. (Code Civ. Proc., § 437c, subd. (n).)" (*Marquez v. Mainframe*

(1996) 42 Cal.App.4th 881, 884.) "[O]n appeal of a summary judgment the proper standard is independent review — we examine the facts as presented to the trial court on a summary judgment motion and independently determine their effect as a matter of law. [Citations.]" *(Id.* at pp. 884-885.)

A. *National Bank Act Preemption*

The National Bank Act (NBA) gives a national banking association the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss* such officers or any of them *at pleasure,* and appoint others to fill their places." (12 U.S.C. § 24 (Fifth), italics added.) The trial court found that undisputed evidence showed Bank of America is a national banking association of which Marques was an officer whose termination was ratified by the Board of Directors (see *Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1103 (*Wells Fargo*)). It therefore ruled that all her claims were preempted by section 24 (Fifth). On appeal, Marques's main contention is that the NBA's "at pleasure" provision does not preempt claims based on a state antidiscrimination statutory scheme such as FEHA.

"Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' [Citations.]" (*Gade v. National Solid Wastes* (1992) 505 U.S. 88, 98.) Congressional intent to preempt state law is implicit in an actual, irreconcilable conflict between state and federal statutes, such that "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [Citations.]" (*Ibid.,* see also *Barnett Bank v. Nelson* (1996) 517 U.S. __ [116 S.Ct. 1103, 1108].)

"Nevertheless, pre-emption is not to be lightly presumed. [Citation.]" (*California Federal S. & L. Assn. v. Guerra* (1987) 479 U.S. 272, 281.) On the contrary, a party claiming preemption has the burden of overcoming the presumption against it. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 937; *Chemical Specialties Mfrs. Ass'n., Inc. v. Allenby* (9th Cir. 1992) 958 F.2d 941, 943.) "The 'controlling principle' . . . is that 'any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.' [Citation.]" (*Aalgaard v. Merchants Nat. Bank, Inc.* (1990) 224 Cal.App.3d 674, 688 (*Aalgaard*).)[1]

In *Aalgaard,* the court held that a FEHA action alleging age discrimination by a national banking association with fewer than 20 employees was preempted by section 24 (Fifth). (*Id* at p. 677.) In so doing, it rejected plaintiff's contention that the preemption doctrine was not applicable to his claim because Congress had enacted a comparable statute, the Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 et seq.), banning age discrimination by employers of more than 20 persons, not excepting national banks (29 U.S.C. §§ 623, 630-(a) & (b)). (*Aalgaard, supra,* 224 Cal.App.3d at pp. 693694.) "By implication," the court admitted, "Congress arguably has decreed that national banks with 20 or more employees are bound by the federal age discrimination statute," but no such repeal by implication can be asserted as to smaller

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1. Marques does not deny that this "conflict pre-emption" (*Gade v. National Solid Wastes, supra,* 505 U.S. at p. 98) bars both of her contract-based claims. (*Wells Fargo, supra,* 53 Cal.3d at pp. 1087-1088 ["It has been established for almost a century that section 24 preempts all state law causes of action by a bank officer for breach of an employment agreement."]; see also, *Mardula v. Rancho Dominguez Bank* (1996) 43 Cal.App.4th 790, 793 (*Mardula*).)

national banks. (*Id.* at p. 694.) Thus, the *Aalgaard* case does not foreclose the possibility that *state* discrimination claims against larger banks might not be preempted by the NBA to the extent they are cognizable under federal law.[2] The California Supreme Court has subsequently noted the issue, but said "we need not and do not decide this important and difficult question. [Citation.]" (In so doing, it summarized *Aalgaard's* holding as "state age discrimination preempted by section 24 discharge.") (*Wells Fargo, supra,* 53 Cal.3d at p. 1104.)

As noted in *Mardula, supra,* 43 Cal.App.4th at page 793, federal courts *have* considered the preemptive effect of federal dismissal-at-pleasure provisions (see *ante,* fn. 2) on state discrimination claims with varying results. For example, in *Ana Leon T. v. Federal Reserve Bank of Chicago* (6th Cir. 1987) 823 F.2d 928, 931 (*Ana Leon T.*), the court held the Federal Reserve Act's dismissal-at-pleasure provision preempted plaintiff's discriminatory discharge claim under Michigan's statutory scheme, although she could have brought it under Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.). (See also *Osei-Bonsu v. Federal Home Loan Bank of New York* (S.D.N.Y. 1989) 726 F.Supp. 95, 97-98 [dismissal-at-pleasure provision of Federal Home Loan Bank Act deprives New York State Division of Human Rights of jurisdiction over discriminatory discharge claims]; *Kispert v. Federal Home Loan Bank* (S.D.Ohio 1991) 778 F.Supp. 950, 952-953 [following *Ana Leon T.*].)

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2. "[T]he cases demonstrate that section 24, and similar provisions covering employees of Federal Reserve Banks (12 U.S.C. § 341) and federally chartered thrift institutions (12 U.S.C. § 1432(a))" do not "appear to bar claims that the discharge violated federal antidiscrimination statutes. [Citations.]" (*Mardula, supra,* 43 Cal.App.4th at p. 793, citing three federal district court decisions.) The Bank and its amicus assume arguendo that this is true.

On the other hand, in *Moodie v. Federal Reserve Bank of New York* (S.D.N.Y. 1993) 831 F.Supp. 333, 336 (*Moodie*), the court disagreed with *Ana Leon T.* because "the Sixth Circuit's pronouncement gives no basis for its opinion and sets forth no policy reasons for its holding." The district court found nothing in the Federal Reserve Act to support the view that Congress considered employment discrimination at the time of its enactment (*Moodie, supra,* 831 F.Supp. at p. 336), and nothing in the language of its dismissal-at-pleasure provision to support the view "that Congress intended that section to exempt the Federal Reserve Banks, in the area of employment discrimination, from statutes or regulations of the states in which they operate, particularly when the state statutory scheme is consistent with federal legislation." (*Id.* at p. 337.) The court held, therefore, that section 24 did not preempt New York State Human Rights Law claims. (*Ibid.;* see also *White v. Fed. Res. Bank* (Ohio App. 8 Dist. 1995) 660 N.E. 2d 493, 495496 [following *Moodie*].)

Marques would have us adopt the *Moodie* analysis, and hold that FEHA does not conflict with the National Bank Act's dismissal-at-pleasure provision, to the extent of its repeal by implication[3] by federal antidiscrimination law. She points out that not only do FEHA and Title VII have identical objectives (*Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, 1316), but their "procedures and remedies" are "wholly integrated and related" (*Salgado v. Atlantic Richfield Co.* (9th Cir. 1987) 823 F.2d 1322, 1325-1326). "Parallel state

3. Although repeal by implication is generally disfavored, it is justified "when the earlier and later statutes are irreconcilable." (*Morton v. Mancari* (1974) 417 U.S. 535, 549; see also *Traynor v. Turnage* (1988) 485 U.S. 535, 547-548 [earlier statute "submerged" if words of later statute would otherwise have no meaning].)

anti-discrimination laws are explicitly made part of Title VII's enforcement scheme. [Citations.]" (*Prudential Ins. Co. of America v. Lai* (9th Cir. 1994) 42 F.3d 1299, 1303, fn. 1.) Preemption of the former would thus "impair and modify" the latter (*Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 101-102), frustrating the hill and objectives of Congress, which include elimination of workplace discrimination.

The Bank counters that allowing claims of workplace discrimination under the law of 50 different states[4] would frustrate the goal of the NBA "to establish a national standard for the dismissal of bank officers which will preserve the public trust in the national banking system." It reasons that while federal antidiscrimination law conflicts with section 24 by limiting a national bank's absolute and unfettered right to terminate its officers' employment, the two can be harmonized — i.e., the NBA may be considered amended by implication (*St. Martin Lutheran Church v. South Dakota* (1981) 451 U.S. 772, 788) only because "the federal discrimination laws regulate the dismissal rights of national banks in the same manner as the NBA — they apply a uniform and predictable standard, adopted by Congress, to all national banks, regardless of where in the country the bank is located."

"To invoke the concept of 'uniformity,' however, is not to prove its need. [Citations.]" (*Atherton v. FDIC* (1997) 519 U.S. __ [117 S.Ct. 666, 671].) "The purpose of the [dismissal-at-pleasure] provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the

4. Despite the clear interdependence of federal and state antidiscrirnination laws, they differ in reach, remedies and remedial fore, as well as in certain procedural standards.

public trust." (*Mackey v. Pioneer Nat. Bank* (9th Cir. 1989) 867 F.2d 520, 526.) This purpose was explained in some detail over a century ago: "Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank." (*Westervelt v. Mohrenstecher* (8th Cir. 1896) 76 F. 118, 122.) Even when a suspicion of dishonesty or carelessness proved unjustified, "it is necessary to the prosperity and success—to the very existence—of a banking institution that the board of directors should have power to remove such an officer, to put in his place another, in whom the community has confidence." (*Ibid.*)[5]

It may well be, as amicus California Bankers Association asserts, that "the power to dismiss a bank officer at will reflects the Congressional mandate to establish an independent national system in order to maintain the stability of, and promote the welfare of, national banks. [Citations.]" (*Alegria v. Idaho First Nat. Bank* (Idaho 1986) 723 P.2d 858, 860.) But once that power is diminished by Congress's determination to outlaw discriminatory terminations, it is hard to see how the public trust rationale mandates "a national standard for the dismissal of bank officers." The national standard enunciated by Congress in Title VII and the ADEA forbids dismissal on the basis of

5. Needless to say, public trust in a large financial institution such as the Bank of America is no longer based primarily on community confidence in the personal integrity of its individual of ricers. It is up to Congress, however, to decide whether the dismissal-at-pleasure provision has therefore become entirely obsolete. (See *Kemper v. First Nat. Bank in Newton* (III. App. 1981) 418 N.E.2d 819, 821.)

age, sex and national origin, precisely the three types of discrimination alleged here. The Congressional goal of eliminating workplace discrimination is not frustrated, but facilitated, by state antidiscrimination law such as FEHA.

Put another way, although national banks are "federal instrumentalities" (*Franklin Nat. Bank v. New York* (1954) 347 U.S. 373, 375) "and, as such, are subject to the paramount authority of federal law" (*ICBA v. Bd. of Governors of Federal Reserve System* (D.C.Cir. 1987) 820 F.2d 428, 436), states may nevertheless regulate them "where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers. [Citations.]" (*Barnett Bank v. Nelson, supra,* 517 U.S. [116 S.Ct. at p. 1109].) Since, under federal law, a national bank may no longer exercise the power to dismiss at pleasure an officer who can show her termination was discriminatory, state antidiscrimination statutes prohibiting such terminations are not preempted.

This resolution of the preemption issue may be approached in a different way but with the same conclusion. The Bank concedes that, of the three routes to preemption (express preemption, occupation of the field, and preemption by conflict), it can prevail only via the latter. Section 24 (Fifth) necessarily conflicts with the FEHA, it maintains. But, at least as to the subjects of the discrimination dealt with in *both* Title VII and the FEHA (and we reemphasize that this case concerns only such),[6] the enactment of Title VII in 1964 effectively vitiated any such conflict.[7] Subsequent to that enactment, there is simply

6. (See *Shaw v. Delta Air Lines, Inc., supra,* 463 U.S. at p. 103, fn. 24.)

7. The drafters of Title VII knew, too, how to legislate exemptions. Section 2000e-1, subdivisions (a) and (b), provide for limited exemptions with respect to aliens employed abroad, employees of religious organizations, etc.

no conflict between federal law (considered in its fullest sense) and California's FEHA.

In light of this holding, we need not address Marques's more specific contentions that (1) certain of her claims are beyond the scope of the Act because they do not arise out of, or relate to, her dismissal, and (2) her dismissal did not comply with the Act's requirements. Her claim that the trial court erred in failing to grant her a continuance to conduct further discovery (Code Civ. Proc., § 437c subd. (h)) is likewise moot, especially since the discovery she sought concerned the issue of the Bank's compliance with the Act's dismissal requirements.

B. *The Postjudgment Orders*

Marques contends the trial court abused its discretion in awarding the Bank its costs because an award to the prevailing defendant in a case such as this is governed not by Code of Civil Procedure sections 1032 and 1033.5, but by the stricter standard of Government Code section 12965, subdivision (b), an FEHA provision, as construed in *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383. Our reversal of summary judgment in all but two of Marques's seven causes of action necessarily entails reversal of the costs award, rendering this issue moot.

Finally, Marques has demonstrated no abuse of discretion (*Dolan v. Buena Engineers, Inc.* (1994) 24 Cal.App.4th 1500, 1504) in the trial court's ruling that the Bank did not engage in sanctionable delaying tactics in producing the minutes of the Board of Director's meeting at which her dismissal was allegedly ratified.

Appendix A

IV. DISPOSITION

Summary judgment is affirmed as to the sixth and seventh (contract) causes of action (see *ante*, fn. 1). In all other respects, the judgment is reversed, and the cause remanded to the trial court for further proceedings in accordance with this opinion. The postjudgment order is affirmed as to denial of the motion for sanctions, but the trial court is directed to vacate the order insofar as it confirms the award of costs to the Bank as prevailing party. Marques is awarded her costs on appeal.

Kline, P.J., and Ruvolo, J., concurred.

APPENDIX B

ORDER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO FILED FEBRUARY 6, 1996

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY OF
SAN FRANCISCO

Case No. 966157

Date: February 5, 1996
Time: 9:30 a.m.
Dept.: 10
The Honorable David A. Garcia
Trial Date: April 15, 1996

VIRGINIA M. MARQUES,

Plaintiff,

v.

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION; and DOES 1-XX, inclusive,

Defendant(s).

ORDER GRANTING DEFENDANT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT

Defendant Bank of America National Trust and Savings Association's Motion for Summary Judgment came for hearing

on Monday, February 5, 1996 in Department 10 of the above entitled Court before the Honorable David A. Garcia. Patricia K. Gillette appeared as the attorney for Defendant Bank of America National Trust and Savings Association ("Defendant" or "the Bank") and Kathleen M. Lucas appeared as the attorney for Plaintiff Virginia Marques ("Plaintiff").

Upon consideration of the moving and opposition papers, the pleadings and files in this action, the arguments of counsel, and all other matters presented, it appears and this Court finds, pursuant to California Code of Civil Procedure Section 437c, that Defendant has shown by admissible evidence and reasonable inferences therefrom, not contradicted by other evidence or inferences, that Plaintiff's Complaint is without merit and must be dismissed in its entirety. This order is based on the grounds that:

I. ALL OF PLAINTIFF'S CLAIMS ARE PREEMPTED BY THE NATIONAL BANK ACT, 12 U.S.C. SECTION 24 (FIFTH)

There is no triable issue of fact that Plaintiff was an officer of the Bank under the National Bank Act or that the Board of Directors of the Bank promptly ratified Plaintiff's termination pursuant to the requirements of *Wells Fargo Bank v. Superior Court (Wertz)* (1991) 53 Cal. 3d 1082 based on the following undisputed material facts and supporting evidence:

Appendix B

Undisputed Facts:	*Supporting Evidence*:
1. The Bank is a national banking association.	1. Declaration of Cheryl Sorokin ("Sorokin Decl.") ¶ 2.
2. The position of Vice President is an officer position authorized by and identified in the Bank's bylaws.	2. Sorokin Decl. ¶ 3 and Exhs. A, B and C.
3. Plaintiff was appointed to the officer position of Vice President by the Bank's Board of Directors on December 7, 1992	3. Sorokin Decl. ¶ 4 and Exh. D; Deposition of Virginia Marques ("Marques Depo.") [at Exh. Q to Gillette Dec.] 239:15-241:4; Exh. R to Gillette Decl.
4. Plaintiff was authorized to perform and did perform duties as a Bank officer.	4. Sorokin Decl. ¶ 6 and Exhs. F-P; Marques Depo. (Gillette Decl. Exh. Q) 242:21-254:3; Exhs. S-W to Gillette Decl.
5. Plaintiff held the officer title of Vice President at the time of the termination of her employment.	5. Marques Depo. (Gillette Decl. Exh. Q) 242: 9-12; Exh. E to Sorokin Decl. at p. D001615.
6. Plaintiff's employment was terminated in September 1994.	6. Complaint ¶¶ 1 and 17; Exh. E to Sorokin Decl. at p. D001615; Elliott Decl. ¶¶ 4-7; and Exhs. 1-3.
7. Plaintiff's termination was ratified by the Bank's Board of Directors on November 7, 1994.	7. Sorokin Dec. ¶ 5 and Exh. E; Elliott Decl. ¶¶ 4-7; and Exhs. 1-3.

Appendix B

IT IS THEREFORE ORDERED, THAT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED AND JUDGMENT IS ENTERED FOR DEFENDANT BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

Dated: February 5, 1996

s/ David A. Garcia
THE HONORABLE DAVID A. GARCIA
JUDGE OF THE SUPERIOR COURT

APPENDIX C

ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED MARCH 11, 1998

First Appellate District, Division Two,
No. A073882/A074529
S066812

IN THE SUPREME COURT OF CALIFORNIA

VIRGINIA M. MARQUES,

Appellant

v.

BANK OF AMERICA NT & SA,

Respondent

Respondent's petition for review DENIED.

Baxter, J., and Chin, J., did not participate.

George
Chief Justice

APPENDIX D

STATUTORY PROVISIONS INVOLVED

NATIONAL BANK ACT

12 U.S.C. § 24 (1998)

§ 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate the [a national banking] association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power. . . .

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places. . . .

FEDERAL RESERVE BANK ACT

12 U.S.C. § 341 (1998)

§ 341. General enumeration of powers

Upon the filing of such [the organization] certificate with the Comptroller of the Currency as aforesaid a Federal reserve bank shall become a body corporate and as such, and in the name designated in such organization certificate, shall have power. . . .

Fifth. To appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this Act, to define their duties, require bonds for them and fix the penalty thereof, and to dismiss at pleasure such officers or employees. . . .

FEDERAL HOME LOAN BANK ACT

12 U.S.C. § 1432 (1998)

§ 1432. Incorporation of banks; corporate powers; housing project loans

(a) The directors of each Federal Home Loan Bank shall in accordance with such rules and regulations as the Board may prescribe, make and file with the Board at the earliest practicable date after the establishment of such bank an organization certificate which shall contain such information as the Board may require. Upon the making and filing of such organization certificate with the Board, such bank shall become as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the Board it shall have the power . . . to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the Board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents. . . .

Appendix D

FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. § 623 (1998)

§ 623. Prohibition of age discrimination

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to this compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act. . . .

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement

of action under this chapter such action shall supersede any State action. . . .

FEDERAL EQUAL PAY ACT

29 U.S.C. § 206 (1998)

§ 206 Minimum wages

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee. . . .

Appendix D

§ 218. Relation to other laws

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter. . . .

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e-2 (1998)

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. . . .

§ 2000e-7. Effect on State laws

Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

CALIFORNIA FAIR EMPLOYMENT AND HOUSING ACT

Cal. Gov't. Code § 12900 (1997)

§ 12900. Citation of part

This part may be known and referred to as the "California Fair Employment and Housing Act."

Appendix D

Cal. Gov't. Code § 12921 (1997)

§ 12921. Employment without discrimination as civil right

The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex or age is hereby recognized as and declared to be a civil right.

CALIFORNIA EQUAL PAY ACT

Cal. Lab. Code § 1197.5 (1997)

§ 1197.5. Discrimination in payment on basis of sex; Administration and enforcement; Records; Civil actions

(a) No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

(b) Any employer who violates subdivision (a) is liable to the employee affected in the amount of the

wages, and interest thereon, of which the employee is deprived by reason of the violation, and in an additional equal amount as liquidated damages. . . .

Supreme Court, U.S.
FILED
JUL 24 1998
CLERK

No. 97-1997

IN THE
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OCTOBER TERM, 1997

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Petitioner,

v.

VIRGINIA M. MARQUES,

Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Two

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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July 27, 1998

QUESTION PRESENTED

Whether the National Bank Act, which allows bank directors to dismiss bank officers "at pleasure," and which Petitioner concedes does not preempt claims brought under Title VII and other federal civil rights statutes, preempts state-law discrimination claims based on conduct prohibited under the federal civil rights statutes.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Respondent Virginia Marques worked for petitioner Bank of America for 38 years, beginning in 1956, when she was 18 years old. In 1991, she became a Credit Administrator in the Bank's Regional Credit Administration. In 1992, the Bank informed her that she was now a "vice president," although that designation did not change her job title, responsibilities, or salary.

In June 1994, the Bank informed Marques that her job was being eliminated because her office was relocating from Rancho Cordova to Fremont, California, approximately 100 miles away. The Bank told her that she could apply for comparable positions during a 60-day period, at the end of which her job would terminate. When her office relocated to Fremont, the Bank gave her position to a younger, less-experienced white male from the Rancho Cordova office. Marques applied for other positions, for which she was qualified, and informed the Bank that she was willing to move. Nonetheless, the Bank did not consider her for any of the other positions. Marques, who is Hispanic, was then 57 years old.

Marques brought this action in California state court. She alleged causes of action for unlawful discrimination based on age, sex, and national origin under California's Fair Employment and Housing Act (FEHA), Cal. Gov't Code § 12900, *et seq.*; for violation of the California's Equal Pay Act, Cal. Lab. Code § 1197.5; for wrongful termination in violation of public policy, FEHA; Cal. Unemp. Ins. Code § 2070, *et seq.*; for breach of contract, and for breach of the covenant of good faith and fair dealing. Petitioner's Appendix 2a ("Appendix"). The Bank moved for summary judgment, arguing that section 24

(Fifth) of the National Bank Act, 12 U.S.C. § 24 (Fifth), which allows bank directors to dismiss bank "officers" "at pleasure," preempted Marques' state-law claims. The trial court granted the motion in its entirety. Appendix 12a-15a. The appellate court reversed as to the state discrimination-based claims and remanded the case to the trial court for further proceedings. Appendix 11a. The California Supreme Court denied the Bank's petition for review. Appendix 16a. Trial has since been set for December 7, 1998.

REASONS FOR DENYING THE WRIT

Review is unwarranted for three reasons. First, a proper jurisdictional basis is lacking because the state court decision below is not a "final judgment" within the meaning of 28 U.S.C. § 1257. *Jefferson v. City of Tarrant*, __ U.S. __, 118 S. Ct. 481 (1997). Second, there is no conflict among the federal circuit courts or state high courts of last resort regarding the question presented here. Third, the decision below is correct.

A. This Court Lacks Jurisdiction To Review The Non-final Decision Below.

"This case, still sub judice in [California], was brought to this Court too soon." *Jefferson v. City of Tarrant*, 118 S. Ct. at 484. This Court's review of state-court decisions is limited to "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). Here, the ruling of the California Court of Appeal reverses the trial court's grant of summary judgment and remands the case for further proceedings. Appendix 11a. Thus, the decision below does not qualify as a "final judgment" within the meaning of section 1257.

This Court has identified four categories of cases that constitute exceptions to § 1257's finality requirement. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-87 (1975). As to the first three, this Court recognizes exceptions where (1) "the federal issue is conclusive or the outcome of further proceedings preordained," (2) the federal issue "will survive and require decision regardless of the outcome of further state court proceedings," and (3) "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 479-81; *see also Jefferson v. City of Tarrant*, 118 S. Ct. at 486. As to these three categories, the judgment involved here does not even arguably apply. If Petitioner prevails on remand, the question presented will no longer require decision. Thus, as in *Jefferson v. City of Tarrant*, "[t]he outcome of those further proceedings could moot the federal question" presented here. 118 S. Ct. at 484. On the other hand, if Petitioner does not prevail on remand, it "will be free to seek [Supreme Court] review when the state-court proceedings reach an end." *Id.*

The fourth exception has two requirements. First, the state court judgment must represent the final word within the state court system on a federal issue, "with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." Second, "a refusal immediately to review the state-court decision" must present a risk of "seriously erod[ing] federal policy." *Cox Broadcasting*, 420 U.S. at 482-83.

This category is also inapplicable here. Petitioner seeks review of a decision of an intermediate-level state court, not of the state's highest court. Although the California Supreme

Court denied review of the *non-final* order below, Appendix 16a, it could accept review of the case when presented in a petition for review from a *final* judgment. *See also Wells Fargo Bank v. Superior Court*, 53 Cal. 3d 1082, 1104 (1991) (California Supreme Court recognizing issue as "important and difficult question" but not necessary to decide in that case). Moreover, allowing this case to proceed to final judgment, rather than immediately reviewing the decision below, does not risk "seriously erod[ing]" any federal policy. *Cf. Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) (allowing adjudication of dispute where parties had contracted for arbitration might erode federal policy embodied in Federal Arbitration Act); *Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983) (allowing case to go forward would risk eroding federal policy requiring matter at issue to be decided by NLRB, not by state courts); *Cox Broadcasting*, 420 U.S. at 485-87 (delaying review would leave important question regarding freedom of press in "uneasy and unsettled constitutional posture [that] could only further harm the operation of a free press"). Therefore, this case does not satisfy the requirements of the fourth exception.

Accordingly, "[t]his case fits within no exceptional category." *Jefferson v. City of Tarrant*, 118 S. Ct. at 487. "Because the [state court system] has not yet rendered a final judgment, [this Court] lack[s] jurisdiction to review" the decision below. *Id.*

B. No Conflict Exists Among Any Federal Circuit Courts Or State High Courts On The Question Presented.

No federal circuit court has decided the question of whether section 24 (Fifth) of the National Bank Act preempts state-law discrimination claims. No federal circuit has decided

the question of whether the comparable provision of the Federal Home Loan Bank Act preempts state-law discrimination claims.[1] And only one federal circuit has decided the question of whether the comparable provision of the Federal Reserve Act preempts state-law discrimination claims. *See Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987) (dismissal at pleasure provision of Federal Reserve Act preempts state statutory discriminatory discharge claim). No state high court has decided the question in regard to any of the three statutes. *See* Petition at 14 nn.15-16. Accordingly, there is no conflict warranting this Court's review.

C. The Decision Below Is Correct.

Petitioner has conceded that section 24 (Fifth) of the National Bank Act does not preempt discrimination claims brought under Title VII, 42 U.S.C. 2000e, *et seq.*, and other federal civil rights laws. Petition at 5-6, 11. As the court below noted, Appendix 6a, California's FEHA and Title VII have identical objectives. *See California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 283 (1987); *Mixon v. Fair Employment & Housing Comm'n*, 192 Cal. App. 3d 1306, 1316 (1987); *see also Kremer v. Chemical Construction Corp.*, 461 U.S. 462, 277 (1982) ("state fair employment practice laws are explicitly made part of the Title VII enforcement scheme"). In addition, their "procedures and remedies" are "wholly integrated and related." *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322, 1325-26 (9th Cir. 1987). Thus, the court below correctly held that, as to the subjects of discrimination addressed by federal

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[1] *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983), cited by Petitioner (at 14 n.15), is inapposite because it did not involve state-law discrimination claims.

and state anti-discrimination laws, the enactment of the federal laws "effectively vitiated" any conflict between state anti-discrimination laws and section 24 (Fifth). Appendix 9a.

Moreover, Petitioner's contention that allowing FEHA claims to go forward impairs a statutorily protected interest in the autonomy of national banks and in the uniformity of standards applied to them is unsupported by statute or case law. Neither Congress nor this Court has afforded national banks the uniform and predictable standards Petitioner seeks here. In fact, this Court has recognized that national banks are subject to state regulation where, as here, "doing so does not prevent or significantly interfere with the bank's exercise of its powers." *Barnett Bank v. Nelson*, 517 U.S. 25, 33 (1996) (citing cases).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 27, 1998

(3)

No. 97-1997

Supreme Court, U.S.
FILED
JUL 27 1998
OFFICE OF THE CLERK

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v.

VIRGINIA M. MARQUES,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal First Appellate District

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION AND CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the National Bank Act, which provides that National Banks may dismiss any of their officers at pleasure, preempts the California Fair Employment and Housing Act which, as applied here, provides that they may not.

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IN THE
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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION and CALIFORNIA BANKERS ASSOCIATION IN SUPPORT OF PETITIONER[1]

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[1] No counsel for any party had any role in authoring this brief and no person other than amici curiae made any monetary contribution to its preparation or submission.

The American Bankers Association and California Bankers Association hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. Both parties have consented to the filing of this brief, and their written consents are filed herewith.

INTEREST OF THE AMICI CURIAE

The American Bankers Association and California Bankers Association are, respectively, the principal trade associations for the lending industry nationwide and in the State of California. As representatives for that industry, the associations have a vital interest in this case. This case calls into question the supremacy of provisions of the National Bank Act (under which national banks have operated for well over a century) over contrary state law. If the California Court of Appeal is correct in denying preemptive effect to Section 24 (Fifth) of the National Bank Act, then national banks, nationwide, can be subjected to varied and conflicting obligations with respect to the most critical of their employment decisions, and, most particularly, having those critical decisions second-guessed by state or even municipal authorities in each jurisdiction in which they operate. State and municipal "fair employment" officials, of course, have a different agenda than the safe and sound operation of the national banking system. That agenda is not denigrated here. But Congress has long since vested plenary authority elsewhere to regulate the activities of national banks, leaving no room for supplementation or displacement by local authorities. Consequently, the case raises issues that are of considerable concern to the banking industry at large, and we respectfully submit this brief in order to address those concerns.

REASONS FOR GRANTING THE WRIT

The Conflict Among the Courts

In relevant part, Section 24 (Fifth) of the National Bank Act (12 U.S.C. § 24 (Fifth) (1998)) grants to national banks the apparently unqualified right to "dismiss [their] officers or any of them at pleasure." Federal Reserve Banks similarly have a "dismiss at pleasure" right granted to them by federal statute, 12 U.S.C. § 341 (1998), as do Federal Home Loan Banks, 12 U.S.C. § 1432 (1998). In the latter two cases, the right extends to all employees; in the case of national banks, it is limited to officers of the bank such as the Respondent here, a former vice-president of Bank of America, a national bank. Notwithstanding the difference in scope of the three statutes on a matter not relevant to this case, the courts have regularly and, in our view, correctly construed the "dismissal at pleasure" language of the three (and, in fact, comparable state banking laws as well) *in pari materia*. *See, e.g.*, *Mardula v. Rancho Dominguez Bank*, 43 Cal.App.4th 790, 793 (Cal.App. 1996), *cert. denied*, 117 S. Ct. 1106 (1997); *Citizens State Bank v. Libertelli*, 215 N.J.Super. 190, 521 A.2d 867 (N.J. Super. 1987).

In *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928 (6th Cir.), *cert. denied*, 484 U.S. 945 (1987), the Sixth Circuit held that a Michigan state law prohibition against racial discrimination in employment was preempted by the comparable provision of the Federal Reserve Act, but in *Moodie v. Federal Reserve Bank of New York*, 831 F.Supp. 333 (S.D. N.Y. 1993), a federal district court reached the opposite conclusion construing the same federal law. So did a state court in Ohio in *White v. Federal Reserve Bank*, 660 N.E. 2d 493 (Ohio App. 1995).

In *Kispert v. Federal Home Loan Bank*, 778 F. Supp. 950 (S.D. Ohio, 1991), a federal district court within the Sixth Circuit applied the reasoning of *Ana Leon T.* to find that the dismissal at pleasure provisions governing Federal Home Loan Banks preempted contrary state law. So did the Southern District of New York in *Osei-Bonsu v. Federal Home Loan Bank of New York*, 726 F. Supp 95 (S.D.N.Y. 1989), a decision whose reasoning was not followed by the same district court four years later in *Moodie*.[2]

The decision of the court below continues and exacerbates the conflict among the courts. *Marques* holds that state discrimination claims are not preempted by the National Bank Act in the face of even California state court precedents that hold the contrary. In *Mardulla*, for example, the California Court of Appeal wrote that

> section 24, and similar provisions...bar covered offices and employees from claiming that their discharge constituted...violation of state antidiscrimination statutes... [Cited] cases implement a forceful public policy that a nationally chartered bank must be free to remove and replace officers at will.

Mardulla v. Rancho Dominguez Bank, supra., 43 Cal.App.4th at 793-794.

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[2] *See also Confer v. Federal Home Loan Bank*, 271 Ill. App. 3d 1061, 649 N.E. 2d 476, 479 (Ill. App. 1995) holding that a state law "retaliatory discharge" claim was preempted by the Home Loan Bank law and opining, in dicta, that a state age discrimination claim would have been preempted, too.

Similarly, in *Aalgaard v. Merchants National Bank*, 224 Cal.App.3d 674, 692 (1990), *cert. denied,* 502 U.S. 901 (1991), the court wrote that permitting state law discrimination claims "would frustrate the full effectiveness of federal law by diminishing the full power of the board to dismiss its officers for the benefit of national banks."

It is difficult, if not impossible, to reconcile either of those conclusions with the outcome of *Marques* in the case below. The court below attempts to distinguish away its *Aalgaard* precedent on the grounds that Merchants National Bank was a little national bank and Bank of America is a big one. Pet. App. at 4a-5a. (Federal equal employment opportunity laws, but not California state laws, exempt small employers from coverage. *See* 29 U.S.C. § 630(b); 42 U.S.C. § 2000e(b)). But there is no basis for such a distinction in the National Bank Act or in preemption doctrine generally. State second-guessing of national bank officer employment decisions either "frustrates the full effectiveness of federal law" or it does not. It either "diminish[es] the full power of the board to dismiss its officers" or it does not. It either "prevent[s] or significantly interfere[s] with the national bank's exercise of its powers"[3] or it does not. If applicability of state anti-discrimination laws to national banks does have any of these effects, the state laws are clearly preempted; if the state laws do not have any such effect, then they are not preempted, without regard, either way, for the size of the bank in question. Yet the California courts reach conflicting decisions based upon this irrelevant consideration.

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[3] *Barnett Bank v. Nelson*, 116 S. Ct. 1103, 1109 (1996).

Clearly, therefore, state and federal appellate courts, and state and federal trial courts have taken irreconcilable positions on the question whether the National Bank Act officer employment provisions and comparable provisions applicable to Federal Reserve Banks and Federal Home Loan Banks preempt state antidiscrimination laws. Those conflicts among the courts have arisen over the course of at least a decade of litigation and will continue to plague the bench and the bar in the absence of a definitive resolution of the issue by this Court.

The Importance of the Issue

The court below concluded that, despite the plain language of Section 24 (Fifth), "under federal law, a national bank may no longer exercise the power to dismiss at pleasure an officer who can show her termination was discriminatory." Pet. App. at 9a. That being the case, the court goes on, "once that power is diminished by Congress's determination to outlaw discriminatory terminations, it is hard to see how the public trust rationale mandates 'a national standard for the dismissal of bank officers'" *Id.* at 8a. The court below, likewise too lightly, also dismisses an expressed concern for the need of uniform national standards in the governance of national banks: "To invoke the concept of 'uniformity,' however, is not to prove its need." *Id.* At 7a. (quoting *Atherton v. FDIC*, 117 S. Ct. 666, 671 (1997)).

The decision of the court below is based upon a fundamentally flawed premise. It *assumes* that the federal equal employment opportunity laws apply to national bank *officer* employment decisions. If that is so, the court reasons, then state fair employment laws to the same effect as the federal laws are not inconsistent with federal law

considered as a whole, and are not preempted. But it is not at all clear that Title VII and the Age Discrimination in Employment Act ("ADEA") *do* apply in this context. Certainly, national banks have and claim no exemption from these statutes with respect to their employment of non-officer personnel. But officers are different. They are made so by Section 24 (Fifth) of the National Bank Act, a section of the law that was left unaltered by the Congress when it enacted ADEA and Title VII and thereafter.

ADEA and Title VII are laws of general applicability. They govern the activities of "employers." 29 U.S.C. § 623; 42 U.S.C. § 2000e-2. Section 24 (Fifth), on the other hand, is of quite limited and specific applicability. By its own terms, it governs the employment practices of one discrete and identified class of employer, and even then, only those employment practices that pertain to the banks' officers. It is a most common rule of statutory construction, endorsed over and over again by this Court[4], that a specific statute is deemed to control over a general one where the two would otherwise be in conflict.

Moreover, this Court regularly holds that "repeals by implication will not be recognized, insofar as two statutes are capable of co-existence, 'absent a clearly expressed congressional intent to the contrary.'" *Astoria Federal Savings & Loan Association v. Solimino*, 501 U.S. 104, 109 (1991) (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). *See also County of Yakima v. Confederated*

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[4] *See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987); *Busic v. United States*, 446 U.S. 398, 406 (1980), *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-229 (1957), *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944).

Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 262 (1992). And yet to hold that the federal equal employment opportunity laws govern national bank officer employment decisions necessarily assumes that a portion of the National Bank Act has been repealed by implication. Nothing in the text of the equal employment opportunity laws or the legislative history surrounding the enactment of those laws evidences any intent of Congress to do so or even any indication that Congress considered the matter at all, one way or the other.

The court below ignored those principles and dismissed out of hand well over a century of precedent that has established (not just "invoked") the need, not only for uniformity in the treatment of national banks, but also for the safety and soundness of those banks.

The Eighth Circuit, as long ago as 1896, held that the purpose of Section 24 (Fifth) was to codify the "observation and experience...that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank." *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896). The Ninth Circuit agreed -- 93 years later -- holding that the purpose of Section 24 (Fifth) "was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order *to maintain the public trust." Mackey v. Pioneer National Bank*, 867 F.2d 520, 526 (9th Cir. 1989). Thus, courts have recognized the overriding importance of vesting broad discretion in bank

boards both before and after enactment of the various federal and state anti-discrimination statutes.

Nevertheless, the court below belittles those holdings, saying that "public trust in a large financial institution such as Bank of America is no longer based primarily on community confidence in the personal integrity of its individual officers." Pet. App. at 8a, n. 5. To the extent that might be true, it supports, rather than detracts from, the petitioner's contention that federal law preempts contrary state law in this case. If anything has replaced "integrity" as a factor in the "public trust" of banks, it is federal deposit insurance, which was created during the Depression precisely in order to promote confidence in the nation's banking system. *Gunter v. Hutcheson*, 674 F.2d 862, 870 (11th Cir.), *cert. denied,* 459 U.S. 826, *rehearing denied,* 459 U.S. 1059 (1982). The Federal Deposit Insurance Corporation, an agency of the United States government, was created to administer a deposit insurance fund, 12 U.S.C. §§ 1821-1823. Consequently, there is a distinct interest of the federal government itself, in addition to the interests of the customers of banks, in the safety and soundness of the banks. Prior to the enactment of the Federal Deposit Insurance Act, Congress saw fit to entrust the "integrity" of national bank officers to the bank's board of directors. After creation of Federal deposit insurance, Congress did not see fit to withdraw that function from banks' boards, at least in the first instance, but did choose to supplement board supervision with a grant of authority to the Comptroller of the Currency (in the case of national banks) to remove an officer of a national bank who has violated any law or regulation or who has engaged in unsafe or unsound practices in connection with the bank. Pub. L. 89-695, § 202 (1966) (12 U.S.C. § 1818(e)).

Thus, the "public trust" in national banks that was important in the last century has remained important to this day, though perhaps in part for different reasons. Congress has elected how it wishes to support and affirm that public trust through its regulation of national bank officer employment practices--by a bank's board of directors in the first instance, and then by supervision of the Comptroller of the Currency. The statutes leave no room for second-guessing by state fair employment practices laws that do not place such safety and soundness concerns in the balance with the putative concerns of persons the state laws were designed to serve. The California Court of Appeal's cavalier disregard of such a critical matter of national and federal concern should not stand unreviewed and unchanged.

CONCLUSION

For all of the reasons stated herein and in the bank's Petition for Writ of Certiorari, we respectfully urge the Court to grant that Petition.

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July 27, 1998

No. 97-1997

Supreme Court, U.S.
FILED
AUG 5 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION,

Petitioner,

vs.

VIRGINIA M. MARQUES,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District, Division Two

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6 pp

Respondent's opposition notably eschews more than a passing response to the merits of Bank of America's petition. Instead it argues that the petition should be denied because this Court assertedly lacks jurisdiction to review it. But that argument overreads the very cases on which it relies, and, hence, urges a conclusion which those cases do not support.

THE DECISION OF THE CALIFORNIA COURT OF APPEAL IS FINAL FOR JURISDICTIONAL PURPOSES

Respondent argues that the decision of the California Court of Appeal is not a final judgment within the meaning of 28 U.S.C. § 1257(a) and thus that the Court lacks jurisdiction to review it. At base, respondent contends that since further proceedings are required below on remand, the Court should — indeed must — await the conclusion of those proceedings before addressing the question presented here. Should petitioner prevail on remand, the issue would be moot; if respondent prevails, petitioner could seek review in this Court at that point, or so the argument goes.

This Court has considered on numerous occasions the contours of the finality requirement. Perhaps the most detailed recent analysis is contained in *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), the case principally relied upon by respondent here. In *Cox*, the Court noted that the finality requirement, if read literally, would "preclude review where anything further remains to be determined by a state court", but went on to observe

> that the rule had not been administered in such a mechanical fashion and that there were circumstances in which there has been "a departure from this requirement of finality for federal appellate jurisdiction".

Cox Broadcasting Corporation, 420 U.S. at 477, quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). The Court further noted that:

> [t]here are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid "the mischief of economic waste and of delayed justice. . .".

Id. at 477-478.

The fourth of these categories is the one pertinent here:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might

> seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

Id. at 482-483.

This case falls squarely within the class of cases described in the paragraph just quoted. The federal issue presented here is whether state anti-discrimination laws are preempted by the National Bank Act. 12 U.S.C. § 24 (Fifth). The California Court of Appeal held that they are not. Reversal of that decision by this Court would be preclusive of any further litigation in the state court on the relevant causes of action. Moreover, since there are no other federal issues involved in the litigation, further proceedings on remand would not give rise to possible piecemeal review of federal issues. *See, e.g., Flynt v. Ohio*, 451 U.S. 619, 621 (1981) (per curiam); *Cox Broadcasting Corporation*, 420 U.S. at 477. And finally, where, as here, the federal question is one of preemption, allowing the question of the Bank's liability under state anti-discrimination laws to be adjudicated in the state action would involve a serious risk of eroding important federal statutory policy, to wit: the policy reflected in the National Bank Act and other federal banking statutes that the substantive standard for retention and dismissal of bank officers as established by Congress must be applied uniformly and to the exclusion of state law. *See* Petition at 8-12.[1]

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1. Nor does the decision in *Flynt*, counsel a contrary result here. In *Flynt*, a criminal case, the federal question presented — whether the prosecution was selective or discriminatory and thus violative of the equal protection clause — did not implicate an important or identifiable federal policy. Rather the question involved a general constitutional challenge made in a large number of criminal prosecutions. To treat such a challenge as a basis for breaching the finality rule would, as the Court observed, permit the fourth *Cox* exception to swallow the rule. By contrast, a preemption challenge, like the one here, raises no such specter and on its face necessarily implicates federal policy as manifested in Congressional action at odds with the potentially preempted state law.

Far from suggesting the absence of jurisdiction here, *Cox* demonstrates why such jurisdiction exists. Indeed, the Court in *Cox*, in illustrating the application of the "fourth category" exception, cited two cases, *Construction General Laborers v. Curry*, 371 U.S. 542 (1963) and *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), both of which involved state court decisions rejecting federal preemption claims, the immediate review of which was deemed necessary to further the federal policies involved. *See, Cox Broadcasting Corporation*, 420 U.S. at 483-484; *see also, Belknap v. Hale*, 463 U.S. 491, 497 n.5 (1983). Despite respondent's tepid assertion that there is no longer a need for uniformity in regard to national banks, neither case law nor the critical changes that are taking place in the banking industry offer any support for that position. To the contrary, as the petition demonstrates — with virtually no rebuttal from respondent — there is a strong and enduring national policy in favor of uniformity which is threatened by the decision below. Thus, there is both jurisdiction and good cause to grant the petition.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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